No. 49722-1-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

JEFFERY EUSSEN, Personal Representative of the Estate of Myurlin J. Eussen, Appellant,

v.

JANICE PARKER, Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This matter addresses a narrow issue of law: what constitutes a joint account with survivorship rights rather than a joint account? The Appellant, Jeffery Eussen ("Eussen"), requests that this Court reverse the trial court's denial of Eussen's Motion for Hearing on the Merits with Regard to Petitioner's Verified TEDRA Petition ("the Petitioner's Motion") wherein the trial court ruled, without support, authority or evidence, that the intent of the parties was to open joint accounts with survivorship rights.

The trial court's ruling flies in the face of strong statutory authority and case law concerning what is necessary to establish a joint account with survivorship rights. The trial court's order should be reversed and the Petitioner's Motion should be granted on the basis that the parties established a joint account, without survivorship rights. As a result, the funds in those accounts should have been deemed to be assets of the estate of Myurlin Eussen.

II. ASSIGNMENT OF ERROR

The trial court erred by denying the Petitioner's Motion where, failing the requirements of RCW 30A.22.040, the parties who opened the bank account in question failed to include a provision that the funds of a

deceased depositor became the property of the surviving depositor or depositors.

The trial court further erred by dismissing the TEDRA Petition, by failing to find that a constructive trust had been established, and by failing to award Eussen his reasonable attorneys' fees and costs.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where funds were deposited into bank accounts by the decedent and those bank accounts were jointly held with other individuals (but not jointly with right of survivorship), and where there were funds in the account at the time of the decedent's death, was the trial court in error by failing to hold that the remaining funds are probate assets that should be distributed as such?

Where the documentation signed by the depositors and opening said bank accounts identifies the accounts as "**JOINT**" but fails to expressly identify the accounts as **JOINT WITH SURVIVORSHIP RIGHTS**, are the funds remaining in the account probate assets?

Where the Respondent unilaterally distributed those funds deposited by the decedent and where those funds were assets of the estate, was a constructive trust established against the Respondent and in favor of the estate, for the funds distributed?

IV. STATEMENT OF THE CASE

Myurlin J. Eussen ("Myurlin") died on March 4, 2015, intestate. *See CP. 72.* She did not have a surviving spouse at the time of her death. *See CP. 2.* She passed away as a resident of Pierce County, Washington. *See id.*

Approximately 10 years prior to her death, on October 6, 2005, Myurlin opened a bank account at KeyBank, which account ends in the numbers 7102. *See CP. 39.* She opened the account together with Respondent Janice Parker and with Jade Parker. *See CP. 37.* All three signed an agreement entitled "Account Express Plan," which provided the details of the newly opened account. *See id.* The Account Express Plan stated that the ownership of the account was "**JOINT**". *See id.* The Account Express Plan agreement required the signators to make numerous acknowledgements and representations concerning the new account. *See id.* However, the agreement made no representations or statements concerning survivorship rights.

Myurlin deposited $90,000 of her own money into the account, which comprised of the source of funding for the account during the period in which it was open. *See CP. 136.* There is no evidence that anyone other than Myurlin made any deposits into the account.

Upon her death, Myurlin was survived by the following heirs, legatees, devisees, beneficiaries and transferees:

Jeffery Eussen (Petitioner)	Son
James Eussen	Son
Janice L. Parker (Respondent)	Daughter
Jason Otto	Grandson
Jenna Otto	Granddaughter

See CP. 2-3.

After the payment of final expenses, the Respondent admits that Myurlin's account had $126,152.22. *See CP. 11* (**"After paying a little over $4,000 in bills, her account now has $126,152.22"**). In fact, in a letter to her family, the Respondent acknowledged that the money in the account belonged to her mother, Myurlin, and was not hers:

> I just wanted to touch base with you about the status of mom's finances. I think that after four months time, most, if not all of her medical bills have come in; but I really have no way of knowing for sure. However, I do feel comfortable with distributing her money and I hope that you will agree with what I have decided.
>
> The hardest part in making this decision was based on the fact that mom never left me any instructions on what she wanted done. After paying a little over $4,000.00 in bills, her account now has $126,152.22.

See CP. 11.

The Respondent previously told members of the family that she would wait for a while before she would distribute funds belonging to the decedent. *See CP. 11.* Eussen expected the distribution of the estate to follow State law for an intestate decedent. *See CP. 4.* However, he received no notice of any probate proceedings or any legal process to administer Myurlin's estate. *See id.*

Instead, the Respondent unilaterally distributed funds belonging to Myurlin's estate without contacting her siblings for input and without Court authorization. *See CP. 4; see also CP. 11.* Eussen learned of the Respondent's activities through the certified letter on July 8, 2015. *See CP. 11.*

In her letter, the Respondent wrote that she prayed about how to distribute the money and then she made her decision. *See id.* As a result of those prayers, she had given $15,000 to each of the decedent's grandchildren. *See id.* Three of the grandchildren are the Respondent's children, two of the grandchildren are the children of James Eussen, and two of the grandchildren are the children of Eussen's and the Respondent's deceased sister, Jackie. *See id.*

The letter also enclosed a check in the amount of $5,000 made payable to Eussen. *See id.* The Respondent stated that she was giving herself, James Eussen and Jeffery Eussen checks in the amount of $5,000

and was going to use the remaining $6,152.22 to buy new carpeting for herself and pay any bills from Myurlin that might be remaining. *See id.*

On the evening of July 8th, 2015 and again on the morning of July 9th, 2015 Eussen called the Respondent and asked her about why she distributed Myurlin's estate in the manner she outlined in the letter and in derogation with the proper distribution under the law. *See CP. 5.* The Respondent offered no answer to these questions. *See id.* The distribution of Myurlin's assets failed to conform to the laws of intestate distribution.

As a result, Eussen initiated probate with Pierce County Superior Court and was appointed as the Personal Representative/Administrator of Myurlin's estate. *See CP. 5.*

On or about October 3, 2016, Eussen brought a Motion for Hearing on the Merits with Regard to Petitioner's Verified TEDRA Petition, requesting that the trial court enter an order declaring that those funds deposited by Myurlin into two KeyBank accounts before her death and later unilaterally distributed by the Respondent are probate assets. *See CP. 12.* Eussen further requested that the trial court enter an order compelling the Respondent to return to the Estate Administrator all probate assets including without limitation the funds she unilaterally disbursed from the KeyBank accounts. *See id.* Finally, Eussen requested that the TEDRA action be

consolidated with the probate action (Pierce County Superior Court Cause No. 15-4-01254-4). *See id.*

A hearing was held on November 18, 2016 during which the trial court denied Eussen's Motion and dismissed the TEDRA Petition. *See CP. 155-158.* Request for establishment of a constructive trust was denied, and request for fees and costs was denied.

V. STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a trial court's order concerning a summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)); *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 833, 906 P.2d 336 (1995).

VI. ARGUMENT

A. The trial court's ruling is erroneous because bank accounts set up as "JOINT" accounts rather than "JOINT WITH SURVIVORSHIP RIGHTS" do not convey survivorship rights to the other individuals named on the accounts.

Respondent Janice Parker stated, under oath, that the CD account (ending in 7102) was opened in October 2005 with a $90,000 deposit, which

money she admits belonged to decedent Myurlin Eussen. *See CP. 34; see also CP. 136.* The documents used to open the account indicate that those named on the account were Myurlin J. Eussen, Janice L. Parker and Jade W. Parker. *See CP. 37.* The ownership status of the account is listed as "**JOINT**". *See id.* No part of the agreement stated anything about joint ownership with survivorship rights, or even mentioned survivorship rights. *See id.*

The agreement stated that if the signators open a joint account, it "will be jointly owned by us." *See id.* The agreement also stated that the bank, at its discretion, might act upon instructions from any one of the named owners of the account to deposit, withdraw or transfer funds between accounts, to recognize and honor the signatures of any of the named owners on checks and withdrawal slips, and honor electronic withdrawals or transfers. *See id.* However, the agreement made no mention of survivorship rights or disbursement of funds upon the death of any of the named owners of the account. *See id.*

Additional details about the account ending in 7102 indicate that the balance on March 3, 2015 was $106,284.84, when the account was closed. *See CP. 39.* This account contained $106,284.84 of the decedent's funds at the time of her death. However, the Respondent advised Eussen that the total remaining funds, after the payment of Myurlin's final bills, was

$126,152.22 – $19,867.38 more than the closing balance in the account. The balance of $19,867.38 has not been accounted for to-date. Most likely these funds were held in a second account ending (4589). *See CP. 41.* The February 26, 2015 statement for account 4589 indicates a balance of $23,080.21 and also indicates that a total of $23,114.00 was withdrawn. *See id.* The March 25, 2015 statement indicates a balance of $401.29 as of February 26, 2015 and withdrawals totaling $5,922.00 from the account. *See id.*

Pursuant to RCW 30A.22.040 (statutory authority governing bank accounts and banking institutions), a "joint account with right of survivorship" means an account in the name of two or more depositors and which provides that the funds of a deceased depositor become the property of one or more of the surviving depositors. *See RCW 30A.22.040(10).*

A "joint account without right of survivorship" means an account in the name of two or more depositors and **which contains no provision that the funds of a deceased depositor become the property of the surviving depositor or depositors**. *See RCW 30A.22.040(11).* In the instant case, the agreement signed by the three owners of the KeyBank account ending in 7102 did not contain a provision indicating that the funds of a deceased depositor become the property of the surviving depositors; accordingly, it was not a joint account with survivorship rights. Without such a provision,

the account can only be a joint account without right of survivorship.

The Respondent's claim that the 7102 account is a joint account with survivorship is based solely upon a barely legible Deposit Receipt where a faint "✓" appears next to the words "JOINT WITH RIGHT OF SURVIVORSHIP CERTIFICATE OF DEPOSIT". *See CP. 52.* This deposit receipt slip is not dispositive as to ownership of the account. There are no terms of an agreement on the receipt, nor are there signatures of the account owners. *See id.* RCW 30A.22.060 states that **"[t]he contract of deposit shall be in writing and signed by all individuals who have a current right to payment of funds from an account."** *See RCW 30A.22.060.* Only the Account Express Plan document meets the statutory requirements of a contract of deposit.

B. Ownership of funds on deposit in a joint account without right of survivorship is defined by RCW 30A.22.090.

RCW 30A.22.090 addresses ownership of funds on deposit in a joint account during the lifetime of the depositor. The statute states in pertinent part:

> Funds on deposit in a joint account without right of survivorship and in a joint account with right of survivorship belong to the depositors in proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at

the time the account was created.

See RCW 30A.22.090(2).

RCW 30A.22.100 addresses ownership of funds on deposit in a joint account after the death of a depositor. The statute states in pertinent part:

> **Funds belonging to a deceased depositor which remain on deposit in a joint account without right of survivorship belong to the depositor's estate**, unless the depositor has also designated a trust or P.O.D. account beneficiary of the depositor's interest in the account.

See RCW 30A.22.100(2) (emphasis added).

Legal title to the funds in the joint account is a question of law. *See In the Matter of the Estate of Rudolph Krappes v. Daley*, 121 Wn.App. 653, 660, 91 P.3d 96 (2004); *see also Tapper v. State Employment Security Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The personal representative of an estate has statutory authority to recover estate property that has been removed or misappropriated. *See id.* at 659-660. *See also RCW 11.48.010; .020; .060; .070; and .090.* Furthermore, the estate has standing to litigate the question of legal title to the funds in an effort to recover them for the estate. *See id. See also Estate of Lennon v. Lennon*, 108 Wn.App. 167, 183-84, 29 P.3d 1258 (2001).

It appears that the Respondent alleges that the more than $120,000 in the KeyBank accounts were *inter vivos* gifts from Myurlin to her. This

scenario is not unlike that in *In the Matter of the Estate of Rudolph Krappes v. Daley*, wherein the personal representative of the decedent's estate sued the decedent's niece, demanding return of money which the niece had withdrawn, prior to the death of the decedent, from her and the decedent's joint banking account with right of survivorship. *See In the Matter of the Estate of Rudolph Krappes v. Daley, 121 Wn.App. 653, 91 P.3d 96 (2004).* The evidence, however, showed that the decedent had made all deposits into the account and used the money as his own during his lifetime. *See id. at 663, 91 P.3d 96.* The niece testified that she considered the funds to belong to the decedent and did not appropriate them for her own use. *See id.*

Similarly, all deposits into the KeyBank accounts were made by Myurlin, and the Respondent acknowledged in her letter that the funds belonged to Myurlin. In her letter to her siblings, she refers to the money as being the decedent's money. *See CP. 11.* She states that she prayed over what to do with her mother's money and distributed the money based upon what she believed her mother would have wanted. *See id.* Her letter in no way indicates that the money in the accounts was hers as an *inter vivos* gift. The Court in *The Estate of Krappes* determined that there was no *inter vivos* gift of the funds to the niece. *See In re Estate of Krappes, 121 Wn.App. at 663, 91 P.3d 96.* Similarly, there was no *inter vivos* gift from the decedent to the Respondent.

Taufen v. the Estate of Maria K. Kirpes, 155 Wn.App. 598, 230 P.3d 199 (2010) is instructive. In *Taufen*, the surviving joint checking account holder brought an action against the estate of the deceased account holder, claiming ownership to funds in a checking account. *Taufen v. the Estate of Maria K. Kirpes*, 155 Wn.App. 598, 230 P.3d 199 (2010). The decedent, Maria Kirpes ("Kirpes") had an account jointly held with her former caretaker. *See id.* at 599, 230 P.2d 199. Kirpes closed that account and transferred the balance to a new account. *See id.* She told the banker that the new account would be a joint account with an individual named Terry Yochum ("Yochum"). *See id.* Kirpes made no mention of survivorship rights. *See id.* However, the banker unilaterally elected to add a right of survivorship to the account without discussing it with Kirpes. *See id.* Kirpes and Yochum signed an account card opening the account. *See id.*

The Court of Appeals in *Taufen* stated that the issue turned on Kirpes' intent at the time she opened her account. *See id.* at 601. The Court found that there was no evidence that she intended to set up an account with survivorship rights. *See id.* at 604. The evidence indicated that the banker, not Ms. Kirpes, decided to add survivorship benefits. *See id.* Similarly in the case at bar, the issue is Myurlin's intent at the time she opened the account. The only evidence is the account signature card she signed, which indicated that the account was "**JOINT**" without any mention of

survivorship rights. *See CP. 37.* The check mark on the deposit slip is the equivalent of the banker selecting survivorship rights – neither provides any evidence of the intent of the depositor.

C. The trial court should have stricken the Respondent's submittal of the Deposition testimony of Karen Dole as inadmissible in that Karen Dole has no personal knowledge of the matter in question.

The Respondent's opposition to Eussen's motion included a transcript of the testimony of Karen Dole, an employee of KeyBank, recorded during a deposition taken on October 31, 2016. *See CP. 74-96.*

The trial court erred in admitting the testimony of Ms. Dole, which should have been stricken as inadmissible. Her testimony was replete with speculation and conjecture, as she admitted she had no actual personal knowledge of the bank documents about which she was questioned or the procedures of the bank at that time. The account in question (ending with the numbers 7102) was opened in October 2005. *See CP. 86.* Ms. Dole conceded that she was not working for KeyBank nor was she at the branch where the account was opened at that time. *See id.*; *see also CP. 83.* Ms. Dole stated unequivocally that she had no idea what the parties who opened the account intended, because she simply was not there. *See id.*

D. Karen Dole's testimony concerning the documents is not based upon personal knowledge or information.

Ms. Dole's testimony, even if admitted, adds nothing to the analysis of the bank documents and the nature of the account as being "joint" and not "joint with survivorship rights." Ms. Dole stated that, to open an account and designate the nature of the account, clients must sign a signature card and disclosures. *See CP. 82.* She testified that the Certificate of Deposit document with the faint "✓" on it (the only document where the words "JOINT WITH RIGHT OF SURVIVORSHIP" appear) is not part of the signature card. *See CP. 85.* In other words, it is not part of the documentation that defines the nature of the account. *See id.("**This is not part of the signature card.**").*

Ms. Dole then explained that this document is simply for internal accounting purposes, typically handed to the teller to indicate a credit to the account. *See CP. 86.* The document does not contain signatures or any other representation that it is evidence of the intent of the signatories to the account.

Ms. Dole was specifically asked if the Certificate of Document is part of the agreement of the signatories, and she conceded that she was totally unfamiliar with the document as presented:

Q: What – I mean, is that part of this agreement typically?

A: This is an older document, so honestly I'm not familiar with it.

See CP. 87.

Most importantly, **Ms. Dole did not even know if KeyBank "automatically" considered joint accounts to be joint with survivorship rights, at the time the account was opened**. She stated that "[m]aybe back in that day they had a choice. I don't know. I can't really speak to that." *See id.*

Furthermore, Ms. Dole's testimony concerning who placed the "✓" mark in the box for "Joint with the Right of Survivorship" is mere speculation – she testified that she did not work at KeyBank, or that branch, at the time the account was open. In fact, she has no idea who checked the box or why. *See id.* Certainly she has no knowledge as to Myurlin's intent.

Additionally, Ms. Dole's testimony as to how joint accounts with survivorship rights are set up at KeyBank conflicts with the documents themselves. Initially, she testified that the documents address the survivorship rights, but then she conceded that they in fact only speak to ownership, not survivorship rights:

> Q: And did I hear you correctly that as far as Key Bank is concerned, typically speaking, if you open a joint account it's considered with right of survivorship?

A. It is. You can look in the – our paperwork here. It talks about it. It talks about the owners of the account. Anyone that's signing down, there's an owner of that account.

Q: Well, I don't know if you can read it.

A: It is hard to read on this –

Q: And I would read it –

A: -- copy form.

Q: -- but I would -- I would tell you, too, that if it was clearly stated on Page 1 –

A: Uh-huh.

Q: -- we would not be having this discussion –

A: Yeah.

Q: -- here today. I don't see it using the words –

A. Right of survivorship.

Q: Correct.

A: It talks about ownership.

Q: Right.

A: That's correct.

See CP. 88-89.

In summary, Ms. Dole had no personal knowledge as to the account in question, the intent of the parties, the documents used at that time and their import, or the procedures in place in October 2005. She conceded that

she did not know if, at that time, accounts were set up automatically as "joint with survivorship rights." Ms. Dole's testimony is not relevant, is speculative and should have been stricken by the trial court.

E. Even if considered by the trial court, Ms. Dole's testimony does not change the outcome based upon the bank documents themselves.

Ms. Dole's testimony should have been stricken by the trial court and was not. However, even if her testimony were considered, the analysis remains the same. Ms. Dole's testimony simply does not change the statutory requirements for a joint account with survivorship rights. RCW 30A.22.040(10) states that such an account must specifically provide that the funds of a deceased depositor become the property of one or more of the surviving account owners. The documents for the account in question do not make such a provision – as Ms. Dole herself conceded during her testimony. She admitted that the Certificate of Deposit – the only document that even includes the words "joint with survivorship rights" – is not part of the agreement with the signatories. Ultimately, Ms. Dole's testimony does not change the outcome in this case.

There is no evidence that the account from which the Respondent took funds was ever a joint account with survivorship rights. In fact, pursuant to the signature card, the evidence conclusively indicates it was a joint account without survivorship rights. As such, these funds became the

property of the estate upon the death of Myurlin Eussen and the Respondent's use of and distribution of these funds was wrongful.

F. As a result of the trial court's error, the Respondent was unjustly enriched by her wrongful appropriation of the decedent's property and her wrongful appropriation of the decedent's funds creates a constructive trust.

Upon Myurlin's death, the Respondent unilaterally decided upon the disbursement of the funds in Myurlin's account. She admits to being the only person who had input as to how the money would be disbursed. By removing and disbursing the funds as she desired, the Respondent deprived the estate of its most significant asset.

As a result, the trial court should have imposed a constructive trust in favor of the estate for the assets wrongfully appropriated by the Respondent. A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *See* *Proctor v. Forsythe*, 4 Wn.App. 238, 242, 480 P.2d 511 (1971). Imposition of a constructive trust does not require a finding of fraud or undue influence. *See* *Baker v. Leonard*, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). In cases where there has been no evidence of fraud or wrongdoing, the courts have imposed constructive trusts when the evidence established the decedent's intent that the legal title holder was not the intended beneficiary. *See*

Mehelich v. Mehelich, 7 Wn.App. 545, 500 P.2d 779 (1972).

In the instant case, the Respondent unilaterally stated that she "knew" what her mother wanted with regard to the disbursement of the funds. However, in fact, the Respondent had no right to appropriate, disburse or otherwise use the funds because those funds became the property of Myurlin's estate upon her death. The Respondent's actions create a constructive trust and the Respondent should have been made by the trial court to return the funds to the estate. Failure to do so was erroneous.

G. Eussen should be awarded his reasonable attorneys' fees and costs, jointly and severally against the estate and the Respondent.

The trial court erroneously denied Eussen his attorneys' fees and costs. Pursuant to RCW 11.96A.150, the trial court has the discretion to order costs, including reasonable attorney's fees to be awarded to any party from any party to the proceedings and in such amount and in such manner as is equitable. Similarly, RCW 11.24.050 authorizes the court to award fees and costs in a will contest action.

This action has been brought in good faith by Eussen to ensure the decedent's natural disposition of her estate as per the law and the proper distribution of the estate assets. Since the evidence established the facts as alleged, Eussen should have been awarded his reasonable attorneys' fees

and costs jointly and severally against the estate and the Respondent.

VII. CONCLUSION

In response to Eussen's Motion, the Respondent presented no evidence that the accounts set up by the decedent included survivorship rights that would then allow the Respondent to remove and disburse funds. All of the evidence presented to the trial court established that, in fact, the accounts were joint accounts, without survivorship rights. The evidence further established that all of the funds in question had been placed in the accounts by the decedent, Myurlin Eussen.

The trial court's denial of Eussen's Motion was erroneous and Eussen hereby respectfully requests that the Court reverse the trial court's decision with regard to the accounts in question, regarding the establishment of a constructive trust, and concerning the award of attorneys' fees and costs.

Respectfully submitted this 8th day of March, 2017.

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Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Appellant to be served upon:

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DATED this 8th day of March, 2017 at Tacoma, Washington.

E Thompson

Elizabeth Thompson